RECORD AND BRIEFS

No. 16-534

Supreme Court, U.S.
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In The
Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under section 1610.

PARTIES TO THE PROCEEDING

The Petitioners were judgment creditors in the Northern District of Illinois seeking to enforce a judgment previously entered in the District Court for the District of Columbia. They were the appellants in the court of appeals.

Respondent, Islamic Republic of Iran, was the judgment debtor in the district court and the appellee in the court of appeals.

Respondents, Field Museum of Natural History and University of Chicago, Oriental Institute, were respondents to the judgment creditors' citations to discover assets in the district court, and appellees in the court of appeals. However, the Field Museum has no interest in the outcome of proceedings in this Court.

The United States is not a party to this action. However, it appeared in the district court to file statements of interest pursuant to 28 U.S.C. § 517, and in the court of appeals to file an *amicus* brief and present oral argument supporting the position of the appellees.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals for the Seventh Circuit (Pet.App. 1-38), and the opinion of Judge Hamilton dissenting from the denial of *en banc* review (Pet.App. 39-42) are reported at *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016). The decision of the District Court for the Northern District of Illinois (Pet.App. 43-71) is reported at *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014). All opinions are set forth in the appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The court of appeals issued its order and judgment on July 19, 2016. Pet.App. 1-38. The petition for writ of certiorari was filed on October 17, 2016. This Court granted the petition limited to the first question presented on June 27, 2017. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq*. The current version of the FSIA is set forth in an appendix to this brief. App., infra, App. 1-App. 35. The appendix also includes the full text of the legislation enacting

the FSIA's Terrorism Exception to Immunity, Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (the "NDAA of 2008" or the "NDAA") (App. 36-51). Finally, the appendix includes Section 1087 of the Engrossed Senate Amendment, dated October 1, 2007, to the NDAA (App. 52-60). Additionally, 28 U.S.C. § 1610(g), which is at issue in this case is reproduced in its entirety immediately below.

28 U.S.C. § 1610. Exceptions to the immunity for attachment or execution

* * *

(g) Property in certain actions.

(1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders. Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

STATEMENT OF THE CASE

The petitioners are American victims of a terrorist attack sponsored by respondent, Islamic Republic of Iran ("Iran"). They sued Iran in federal court under the then-applicable terrorism exception to sovereign immunity and obtained a judgment for several million dollars. Pet.App. 2. The petitioners identified collections of ancient Persian artifacts (the "Artifacts") that Iran had loaned to the University of Chicago, and attempted to enforce their judgment against those Artifacts. Applying certain provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, the lower courts held that the Artifacts enjoyed foreign sovereign immunity from execution, and that no exceptions to immunity applied. This case turns on the proper construction of 28 U.S.C. § 1610(g), the terrorism exception to foreign sovereign execution immunity.

In 2008, Congress enacted 28 U.S.C. § 1610(g) as a broad remedial provision designed to expand the availability of assets for post-judgment execution against the property of foreign state sponsors of terrorism, their agencies and instrumentalities. See National Defense Authorization Act ("NDAA of 2008" or "NDAA") for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 ("§ 1083"); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016). Subsection 1610(g) was part of a sweeping amendment to the terrorism exception to foreign sovereign immunity that was designed to remove all impediments to terrorism victims' civil lawsuits against designated state

sponsors of terrorism. See NDAA, § 1083, 122 Stat. 3, 338. All agree that subsection 1610(g) allows terrorism judgment creditors of a foreign state to "pierce the corporate veil" to execute their judgments against assets held by juridically separate instrumentalities of a foreign state defendant. The Seventh Circuit panel held that subsection 1610(g) does nothing more. Pet.App. 35. The Ninth Circuit in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 958-959 (9th Cir. 2016), held that ***in addition*** to enabling veil-piercing, subsection (g) allows attachment of all property of state sponsors of terrorism. The Seventh Circuit's construction cannot be reconciled with the text or purpose of the statute, and should be reversed.

A. Statutory Framework

1. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The FSIA replaced the prior common law-based immunity regime under which courts regularly deferred to executive branch recommendations regarding immunity. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ___, 134 S. Ct. 2250, 2255 (2014). Under the former immunity regime, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488. "Congress abated the bedlam in 1976," replacing the

old system with the Foreign Sovereign Immunities Act's comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. *NML Capital, Ltd.*, 134 S. Ct. at 2255. The FSIA is codified at 28 U.S.C. §§ 1602 *et seq.*

The FSIA codified the "restrictive theory" of immunity, which, as its name suggests, restricted or limited the broad immunity previously extended to foreign sovereigns. *Verlinden*, 461 U.S. at 486. Under the restrictive theory, foreign states enjoy immunity when they engage in activities "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Conversely, it does not immunize a foreign state's conduct that is private in nature, meaning activities in which private parties may engage. *Id.* Nonetheless, even under the restrictive theory, as codified in the FSIA, foreign sovereigns are presumed to be immune from jurisdiction of United States courts, and from attachment, arrest and execution, unless a statutory exception provides otherwise. See 28 U.S.C. §§ 1604, 1609.

Applying the restrictive theory of immunity, the Court has repeatedly insisted that lower courts refrain from expanding foreign sovereign immunity beyond that conferred by statute. Thus, in *Weltover*, the Court held that the government of Argentina was subject to jurisdiction in New York when Argentina defaulted on certain government bonds that were payable in New York. 504 U.S. at 609-610. In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-477 (2003), the Court again refused to expand upon the text of the FSIA to extend

immunity to subsidiaries of an instrumentality of a foreign state.

2. The FSIA provides foreign states with two types of immunity. *NML Capital, Ltd.*, 134 S. Ct. at 2256. The first, jurisdictional immunity, shields foreign sovereigns from jurisdiction of United States courts. *Id.* Sections 1605 through 1607 enumerate the exceptions to jurisdictional immunity. The second form of immunity under the FSIA pertains to the enforcement of judgments; it protects foreign sovereigns from attachment and execution as provided in 28 U.S.C. §§ 1609-1611. For consistency, we will use the term "execution immunity," unless specific reference is made to attachments.

Section 1610 enumerates the principal exceptions to execution immunity. The two most familiar provisions are subsections 1610(a) and (b). Under specified circumstances subsection (a) permits judgment creditors to execute upon the property belonging to a foreign state that is used by the foreign state for commercial activity. Pet.App. 20. Subsection (b) applies to agencies or instrumentalities of foreign states that are engaged in commercial activity in the United States. It allows execution upon property of a foreign state's agency or instrumentality to enforce judgments that relate to claims for which the agency or instrumentality is subject to jurisdiction under specified provisions of §§ 1605 and 1605A.

As a practical matter, courts construe subsection 1610(a)'s "use" requirement narrowly. See e.g., *Conn.*

Bank of Commerce v. Republic of Congo, 309 F.3d 240, 256 n.5 (5th Cir. 2002) ("*CBC*"); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-1091 (9th Cir. 2007); *Aurelius Capital Partners v. Republic of Argentina*, 582 F.3d 120, 131 (2d Cir. 2009). For example, in *CBC*, a bank attempted to garnish royalty and tax payments *owed to* the Republic of Congo by certain Texas oil companies pursuant to a joint venture. *Id.* at 246, 251. The court held that Congo had not ***used*** the funds for commercial activity. *Id.* at 257. "In ordinary usage, we would not say that the revenue from a transaction is 'used for' that transaction." *Id.* at 254. The court explained that from the point of view of the recipient, the revenue "is not put in service of that activity, instead, it is the end result or income of that activity." *Id.*

Aurelius Capital Partners, L.P. v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009), reached a similar result. There, private Argentinian pension funds holding money in the United States were, by Argentinian law, transferred to a state-administered fund. Creditors of Argentina attempted to attach the funds immediately upon transfer to the Administration. However, the assets had not been ***used for*** a commercial activity while they belonged to the state-owned entity, and the court held that they were immune from execution. 584 F.3d at 131.

The case below represents an even narrower application of the "commercial use" exception. The petitioners argued, among other things, that the Artifacts were property of Iran used by the University of

Chicago for commercial activity, and were therefore subject to execution under subsection (a)(7). However, looking beyond the statutory language, the district court held that to be subject to execution under subsection 1610(a), the property must be used ***by the foreign state itself***, and not by a third party such as the University. Pet.App. 51-52. The court of appeals affirmed.

Additional execution immunity provisions of § 1610 include subsections (f), (g), and section 201 of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, Title II, § 201(a), (b), (d), 116 Stat. 2337, 2339, which is codified as a note following § 1610.[1] These apply to attachment and execution of terrorism judgments, and were not included in the FSIA as originally enacted. They provide broad execution immunity exceptions that extend to categories of property that are otherwise immune from execution. As originally enacted, the FSIA did not include any provisions – either under the jurisdictional immunity exceptions or the execution immunity exceptions – that enabled terrorism victims to sue or enforce judgments against the foreign states that sponsored, carried out, or were

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[1] Additionally, subsection 1610(c) addresses certain notice requirements for execution of judgments. Subsection (d) addresses the very limited circumstances under which foreign state property may be subject to pre-judgment attachment. Subsection (e) codifies a narrowly-applicable exception for the arrest *in rem*, sale, and execution against vessels of a foreign state pursuant to a preferred mortgage.

otherwise responsible for terrorist attacks. See e.g., *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994).

3. In 1996, Congress provided American citizens with "an important economic and financial weapon against . . . outlaw states" that sponsored terrorism. H.R. Rep. No. 104-383, at 62 (1995). It enacted the Antiterrorism and Effect Death Penalty Act of 1996, which amended the FSIA to waive the sovereign immunity enjoyed by state sponsors of terrorism (28 U.S.C. § 1605(a)(7) (repealed in 2008 and replaced by 28 U.S.C. § 1605A). Addressing an earlier version of the legislation, the House Judiciary Committee explained that it was intended to provide a remedy for damages for United States citizens subjected to certain ***violations of international law***. H.R. 103-702, 103rd Cong., 2d Sess. (August 16, 1994), at 4, *cited in* Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* (2008).

To limit the scope of the new immunity exception and to allay executive branch concerns about the possible negative impact the new law might have on foreign relations, Congress limited the terrorism exception to actions against State Department-designated "State Sponsor of Terrorism." This restriction enabled the Department of State to determine which states should be deemed "outlaw states" and subject to the new law. This restriction provision remains in effect today. 28 U.S.C. § 1605A(h)(6). At present, only three countries remain on the list of Designated State Sponsors of Terrorism: Iran, Syria, and Sudan. See 31 C.F.R. § 596.201

note ("The name of each country that has been designated under section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405, as a country supporting international terrorism is published in the Federal Register by the Department of State, and a complete list of countries currently so designated can be found via the Web site of the Department of State at http://www.state.gov/j/ct/"). Other states that were previously designated include Cuba, Iraq, Libya, and North Korea.

The 1996 amendment also provided additions to the existing execution immunity provisions that were intended to facilitate enforcement of terrorism judgments. 28 U.S.C. § 1610(a), (b). Despite these amendments to the existing execution immunity exceptions, terrorism judgment creditors faced significant practical and legal difficulties at the enforcement stage. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317-1318 (2016). ***First***, because the new execution immunity exceptions were crafted to fit within the existing framework, "only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Id.* at 1318. Even as to international law-abiding foreign state defendants, the limited judgment execution immunity exceptions would sometimes render a grant of jurisdiction over a foreign state defendant "entirely ineffectual." *Exp.-Import Bank of the Republic of China v. Grenada*, 768 F.3d 75, 84 (2d Cir. 2014). These difficulties were compounded with state sponsors of terrorism, which due to the lack of formal relations with the United States, owned very little property in the United

States that satisfied the narrow commercial use requirements. See *In re Islamic Republic of Iran Terrorism Litig.* ("*Iran Terrorism Litig.*"), 659 F. Supp. 2d 31, 53 (D.D.C. 2009).

Second, most Iranian assets that could be found in the United States had been blocked under various regulations and executive orders, and were in the control and possession of the United States government. *Id.* at 52. Thus, the sovereign immunity of our own federal government along with "a dizzying array of statutory and regulatory authorities" to which the blocked assets were subjected prevented judgment creditors from enforcing their judgments against these assets. *Id.* at 52-53.

Third, if historically, international peaceable foreign state judgment debtors could, at least in many instances, be counted on to honor judgments entered by United States courts, the same could not be said of rogue state sponsors of terrorism, which are "particularly unlikely to submit to this country's laws." *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014).

In response to these difficulties, terrorism plaintiffs began targeting property in which Iran-owned entities held an interest. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 14 (D.D.C. 2011). This tactic, however, led the plaintiffs into yet another impediment to enforcement of their judgments: the application of this Court's decision in *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462

U.S. 611 (1983) ("*Bancec*"). See *Estate of Heiser*, 807 F. Supp. 2d at 14. *Bancec* stands for the proposition that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-627. Following the *Bancec* decision, lower courts identified five basic factors to be considered when deciding whether to disregard the corporate veil of foreign state-owned entities. *Id.* at 630. Thus, as a rule, governmental corporations or other entities cannot be held liable for the debts of their foreign sovereign owners. *Id.* The *Bancec* rule, like the limitation on execution against blocked assets or non-commercial assets impeded terror victim judgment creditors' enforcement efforts. See *Estate of Heiser*, 807 F. Supp. 2d at 14. Thus, even with the amended 1996 execution immunity exceptions, most terror victim plaintiffs who successfully obtained judgments against designated state sponsors of terrorism were drawn into "a long, bitter, and often futile quest for justice." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 45-46.

4. Congress intervened to provide relief for terrorism victims holding judgments that were essentially unenforceable. *Bank Markazi*, 136 S. Ct. at 1318. Congress's first attempt to remedy this situation was the 1998 enactment of 28 U.S.C. § 1610(f), which created a new immunity exception that, for the first time, allowed execution against blocked and prohibited property designated state sponsors of terrorism. *Iran Terrorism Litig.*, 659 F. Supp. 2d at 55-56. The statute

included a Presidential waiver provision, which President Clinton exercised when he signed the bill. *Id.*

In 2000, Congress amended § 1610(f) to include only a limited waiver provision that applies to subsection (f)(1) only. *Id.* at 56. Subsection (f)(1) allows enforcement against blocked assets. The 2000 amendment did not authorize the President to waive subsection (f)(2), which calls upon the executive branch to "make every effort to fully, promptly, and effectively assist any [terrorism] judgment creditor or any court . . . in identifying, locating, and executing against ***the property*** of a foreign state subject to jurisdiction under former § 1605(a)(7) or any agency or instrumentality of such state. See 28 U.S.C. § 1610(f)(2), (3). Notably, the property subject to subsection (f)(2)'s assistance provision is not limited to blocked or regulated property that subsection (1) makes subject to execution. Subsection (f)(2) applies to all property, regardless of whether it is blocked or regulated. President Clinton again exercised his prerogative under the statute to waive the applicability of subsection (f)(1).

In 2002, Congress enacted the Terrorism Risk Insurance Act of 2002 (the "TRIA"), which allows terror victims to execute their judgments against the blocked assets of terrorist parties as well as those of the terrorist parties' agencies or instrumentalities. *Id.* Section 201(d)(2)(A) defines "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act." However, as Judge Lamberth

observed, "[i]n the case of Iran, . . . very few blocked assets exist." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 58. Thus, TRIA offered limited relief to Iran's terrorism judgment creditors.

In 2008, Congress intervened again to expand the terrorism exceptions to foreign sovereign immunity – both as to jurisdiction and enforcement. See NDAA of 2008, § 1083, 122 Stat. 3, 338. The new terrorism exception created by § 1083 included numerous far-reaching provisions that are unique under the FSIA. Section 1083 not only provided an exception to jurisdictional immunity, it also created a statutory private cause of action against foreign state sponsors of terrorism. See 28 U.S.C. § 1605A(c). Nowhere else does the FSIA create a statutory cause of action against foreign states. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004). Section 1083 also explicitly provided for retroactive applicability. 28 U.S.C. § 1605A(a)(2). Further extending its retroactive reach, § 1083(c)(2)(B) of the NDAA of 2008 waives the defenses of res judicata, collateral estoppel, and limitation period to enable holders of judgments previously entered under the former terrorism exception to have their judgments treated as if they were entered under the amended version.

Section 1083 also created new remedies for those who obtained judgments under § 1605A. And, the conversion of judgments made these new remedies available to terrorism victims who had previously obtained judgments under the previous terrorism exception to jurisdictional immunity. One significant new remedy

was the ability to recover punitive damages from sovereign state defendants, something that is explicitly prohibited to other FSIA plaintiffs under § 1606. *Id.* at § 1605A(c). Section 1083 provides for the automatic establishment of a lien of *lis pendens* that attaches to all real and tangible personal property located within the judicial district that would be subject to execution under § 1610. 28 U.S.C. § 1605A(g). The lien attaches to property belonging to the sovereign defendant itself as well as any other entity listed by the plaintiff as being controlled by the defendant state. *Id.*

Correspondingly, section 1083 creates a new execution immunity exception tailored for holders of judgments entered under the new terrorism exception. 28 U.S.C. § 1610(g). The purpose of subsection 1610(g) was to expand the availability of assets for post-judgment execution against the property of foreign state sponsors of terrorism and their agencies and instrumentalities. *Bank Markazi*, 136 U.S. at 1318 n.2. Courts have recognized the "broad remedial purposes" of subsection 1610(g), and agreed that "a core purpose of [section 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heiser*, 807 F. Supp. 2d at 26 (emphasis supplied).

By all accounts, at a *minimum*, subsection 1610(g)(1) abrogates *Bancec*, and enables terrorism judgments entered against a foreign state to be enforced against that state's juridically independent agencies or instrumentalities. See Pet.App. 26. The

court below held that subsection 1610(g) accomplishes nothing more. Pet.App. 27, 35. However, in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 958-959 (9th Cir. 2016), the Ninth Circuit held that ***in addition*** to abrogating *Bancec*, subsection (g) allows attachment of all property of state sponsors of terrorism regardless of whether the property satisfies some additional execution immunity exception.[2]

Subsection 1610(g)(2) provides that in addition to property that is not subject to any sanctions regime, the United States waives its sovereign immunity to allow execution upon property that is "regulated" under the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. 1 *et seq.*, or the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 *et seq.* Unlike the TRIA and subsection 1610(f)(1), subsection 1610(g) does not necessarily take precedence over other provision of law. *Bank Markazi*, 136 S. Ct. 1318 n.2. Thus, for example, diplomatic and consular property remain immune. *Wyatt v. Syrian Arab Republic*, 8 F. Supp. 3d 192, 195 (D.D.C. 2015) ("property exempt from attachment under the [Vienna Convention on

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[2] The Ninth Circuit issued three successive decisions in *Bennett*, each interpreting subsection 1610(g) as an independent execution immunity exception. The first opinion, written by Judge Kozinski, is reported at *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1284 (9th Cir. 2015) (*"Bennett I"*). Upon Iran's first motion for rehearing, the decision was withdrawn and superseded by a second decision authored by Judge Graber. 817 F.3d 1131 (9th Cir. 2016) (*"Bennett II"*). Iran filed a second motion for rehearing. And, the Ninth Circuit entered its third and final decision in which it reaffirmed its prior construction of subsection 1610(g). 825 F.3d 950 (9th Cir. 2016) (*"Bennett III"*).

Consular Relations] is also exempt under the FSIA, regardless of how it would be treated under sections 1610 and 1611.").

B. Factual Background

1. Petitioners, United States nationals, initiated this post-judgment collection action in an attempt to enforce a money judgment entered against Iran for its sponsorship of a triple suicide bombing attack on a crowded pedestrian mall in Jerusalem, Israel on September 4, 1997. See Pet.App. 1-2; *Campuzano/Rubin v. Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003) (findings of fact and conclusions of law in consolidated actions). The bombing took the lives of five people and wounded nearly two hundred others.

The petitioners sued Iran in the United States District Court for the District of Columbia under the then-applicable terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7). Despite Iran's default, pursuant to 28 U.S.C. § 1608(e), the district court conducted a four-day bench trial on Iran's liability and damages.

The district court found that in the years preceding the attack, Iran's Ministry of Information and Security spent between $50 million and $100 million per year supporting various terrorist activities, and, in 1995 alone, Iran contributed $30 million to Hamas. *Id.* at 262. In addition to financial support, Iran provided Hamas with professional military and terrorist training. *Id.* The court found that support for terrorism was

an official state policy, requiring approval of high-ranking Iranian officials. *Id.* The court found that the September 4, 1997 bombing could not have been carried out without the Iranian sponsorship, and that "Iran directly provided material support and resources to Hamas and its operatives, for the specific purpose of carrying out acts of extrajudicial killing, including the bombing at issue here." *Id.* at 262, 270. The court also made detailed findings of fact concerning the victims' extensive injuries. *Id.* at 265-268. On September 10, 2003, the court entered judgment (the "Judgment") in favor of the petitioners, awarding them $71.5 million in compensatory damages against Iran. *Id.*

2. On December 29, 2003, the petitioners registered the Judgment in the United States District Court for the Northern District of Illinois, where they initiated enforcement proceedings against certain Persian artifacts (the "Artifacts") that belong to Iran, but were in the possession and use of Respondent, the Oriental Institute of the University of Chicago (the "University").[3] The petitioners argued that they were authorized to enforce the Judgment against the Artifacts under the commercial activity exception to foreign sovereign execution immunity, 28 U.S.C. § 1610(a).

The petitioners also argued that they were entitled to execute upon the Artifacts under section 201(a) of TRIA, which enables execution upon "blocked" assets of terrorist parties. See 28 U.S.C. § 1610 note.

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[3] The Field Museum of Natural History was also a party in the lower courts, but is no longer involved in this case.

Finally, after the passage of the 2008 FSIA amendments and pursuant to those amendments, petitioners moved in the District Court for the District of Columbia for an order giving their Judgment effect as if the action had originally been filed under the new § 1605A. *Rubin v. Islamic Republic of Iran*, 563 F. Supp. 2d 38, 39 n.3 (D.D.C. 2008). The court granted their motion. *Id.* With their Judgment converted to a § 1605A judgment, the Rubins were empowered to seek attachment of Iran's assets under 28 U.S.C. § 1610(g), and they asserted that additional ground for recovery in the Northern District of Illinois.

Iran and the University moved for summary judgment, arguing that none of these execution immunity exceptions applied to the Artifacts. The petitioners asserted that subsection 1610(a) allowed them to attach and execute upon the artifacts because the artifacts satisfied all of the requirements for enforcement under subsection 1610(a): The Artifacts were property in the United States, belonging to Iran, and were being used by the University for commercial activity in the United States. The district court acknowledged that "Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign." Pet.App. 51. However, it concluded that subsection 1610(a) applies only where the foreign sovereign ***itself*** uses the property for commercial activity. Pet.App. 54.

The court held that TRIA was inapplicable because section 201(a) applies only to "blocked" assets, and the court concluded that the Artifacts had been

unblocked. They were therefore not subject to TRIA. Pet.App. 66.

Finally, the district court held that the Artifacts were not subject to execution under subsection 1610(g). The district court held, "plaintiffs have virtually no support for their contention that Section 1610(g) expands the bases for attachment." Pet.App. 60-61. The court found that construing subsection 1610(g) to allow attachment of ***all*** property of a state sponsor of terrorism would render superfluous subsections (a)(7) and (b)(3), both of which allow attachment of commercial property pursuant to terrorism judgments. Pet.App. 60-61.

The district court held that subsection (g) merely allowed execution upon property that was otherwise excepted from immunity in section 1610. Pet.App. 61-62. Thus, the district court concluded that "Section 1610(g) does not provide a new basis for plaintiffs to attach the assets of Iran." Pet.App. 62. It accepted the respondents' argument that subsection 1610(g) merely enables terrorism victim judgment creditors of foreign sovereigns to "pierce the corporate veil" and enforce their judgments against the agencies and instrumentalities of the foreign sovereigns. Pet.App. 62. The district court granted Iran's and the Museums' motions for summary judgment. Pet.App. 71.

3. The Seventh Circuit affirmed the judgment entered against the petitioners. Pet.App. 1-38. The court of appeals rejected petitioners' subsection 1610(a) argument that property of a foreign sovereign

used for a commercial activity is subject to attachment regardless of who uses the property. Pet.App. 17. The Seventh Circuit also affirmed that district court's holding under TRIA that the Artifacts were "uncontested" property, and had therefore been unblocked by Executive Order 12281. Pet.App. 37-38.

The Seventh Circuit held that subsection 1610(g) is not an immunity exception at all, but merely a provision that enables plaintiffs to pierce the corporate veil of state-owned agencies and instrumentalities. Pet.App. 4, 35. The court held that enforcement of judgments under subsection 1610(g) is available only against property that is otherwise subject to execution under section 1610. Pet.App. 27, 35. The court also adopted the district court's understanding that construing subsection 1610(g) to create an independent immunity exception would render superfluous the execution immunity provisions that were introduced as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241. Pet.App. 27-28.

Thus, the Seventh Circuit expressly rejected the Ninth Circuit's holding in *Bennett*, 825 F.3d 949, *supra*, that subsection 1610(g) is an independent exception to execution immunity intended to allow terrorism victims to execute upon any of a defendant sovereign's United States assets. Pet.App. 32-35. The court below also overruled two of the Seventh Circuit's own precedents, both of which had interpreted subsection 1610(g) as being an independent immunity exception, not subject to the limitations of subsections (a) and (b).

Pet.App. 34-35, *overruling Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014); *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015).

Seventh Circuit Rule 40(e) creates a mechanism for the court to *sua sponte* circulate an opinion for *en banc* consideration when a decision either creates a circuit split or overrules circuit precedent. See Pet.App. 35 n.6; Pet.App. 39. The panel decision below required circulation for consideration of *en banc* review under both prongs of Circuit Rule 40(e). However, because a majority of the active judges had been disqualified from hearing the case, it was impossible to garner the votes of a majority to rehear the case *en banc*. Pet.App. 36 n.6; Pet.App. 39. Without the possibility of rehearing *en banc*, the three-judge panel entered its judgment. Pet.App. 36 n.6.

Judge Hamilton, who was not on the panel below, but had authored the two decisions the court overruled, dissented from the denial of *en banc* review. Pet.App. 39. While reluctantly conceding that the panel had "the power to overrule circuit precedent and to create a circuit split," Judge Hamilton asserted that it was "a mistake" to do so. Pet.App. 39. His objection was based both upon the principle of *stare decisis* and on the merits. Pet.App. 39.

As to the merits, Judge Hamilton refrained from engaging in the textual arguments, which "are laid out in *Bennett* and *Rubin*." Pet.App. 41. However, because he concluded that subsection 1610(g) is ambiguous,

Judge Hamilton cited *Bennett*'s finding that the "legislative history of [the] 2008 amendments shows broad intent to facilitate execution of judgments against ***any*** property owned by state sponsors of terrorism." Pet.App. 41 (emphasis in original); *quoting Bennett*, 825 F.3d 961-962. Judge Hamilton concluded: "We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the *Rubin* panel." Pet.App. 42.

The petitioners filed a timely petition for a writ of certiorari seeking review of the Seventh Circuit's construction of subsections 1610(a) and (g). And on June 27, 2017, this Court granted the petition only as to the construction of subsection (g).

SUMMARY OF THE ARGUMENT

While subsection 1610(g) is an ambiguous provision, its text, purpose, and history demonstrate that it is intended to enable judgment creditors to execute their judgments against all property of foreign state sponsors of terrorism. The Seventh Circuit's narrow construction that requires judgment creditors proceeding under subsection 1610(g) to additionally satisfy the strict commercial use requirements, creates internal inconsistencies and impossibilities that render subsection 1610(g) all but meaningless.

The Ninth Circuit's expansive construction is consistent with the purpose and history of the statute, and

provides a cleaner read of the statutory text. The Seventh Circuit is wrong in holding that a freestanding expansive subsection 1610(g) would render superfluous other terrorism execution immunity exceptions contained in subsections (a)(7) and (b)(3). Congress retained those provisions to cover cases that are not included within subsection 1610(g), either because the judgments were entered under the former terrorism exception to jurisdictional immunity, to which subsection 1610(g) does not apply, or because the judgments are otherwise not enforceable under subsection 1610(g).

The "as provided in this section" clause creates textual tension under either the Seventh or Ninth Circuit's construction. The Seventh Circuit would read that clause to restrict judgment creditors proceeding under subsection 1610(g) to property that can satisfy a commercial use requirement. This limitation itself creates the internal inconsistencies referred to above. The Ninth Circuit would apply the clause to procedures under subsection (f), an earlier terrorism exception to execution immunity. This reading makes sense because Congress designed those procedures to deal with terrorism cases and they provide assistance in executing upon blocked assets, both of which are relevant to execution of judgments under subsection 1610(g).

The weakness, if any, in the Ninth Circuit's construction is that the reference to "this ***section***" should be a reference to ***subsection*** (f). But this difficulty in the Ninth Circuit's reading of the statute cannot be determinative because due to the internal inconsistencies in the Seventh Circuit's reading, as applied,

subsection 1610(g) would work only under very limited circumstances, and only in conjunction with subsection (a)(7).

An alternative interpretation of "as provided in this section" suggests that "this section" refers to the legislation, itself – § 1083 of the NDAA of 2008. This construction gives meaning to both "this section" and to subsection 1610(g) as a whole.

Finally, the legislative purpose and history together with subsection 1610(g)'s inclusion within a comprehensive terrorism exception support the expansive construction of the execution immunity exception. Congress has stated clearly and consistently that it seeks to afford meaningful relief to victims of state sponsored terrorism. Considerations of international comity have no place in dealing with the less-than-a-handful of designated state sponsors of terrorism. And, to the extent comity would apply by virtue of Iran's status as a sovereign state, Congress has the power to, and in fact did, legislate to place the interests of the terrorism victims and of our national interests above the interests of international comity.

ARGUMENT

A. Introduction.

Congress enacted subsection 1610(g) with the specific purpose of removing the remaining obstacles to terrorism judgment enforcement. See *Bank Markazi*, 136 S. Ct. 1318 n.2. "[A] core purpose of [section 1610(g)] is to ***significantly expand*** the number of

assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heiser*, 807 F. Supp. 2d at 26; see also *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). Accordingly, contrary to the decision below, subsection 1610(g) permits victims of terrorism to enforce their judgments against any United States property in which a state sponsor of terrorism holds any interest. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010); *Weinstein*, 831 F.3d at 483 ("section 1610(g) strips execution immunity from ***all*** property of a defendant sovereign.") (emphasis in original). Specifically, subsection 1610(g) permits execution against property even where the strict commercial use requirements of subsection 1610(a) are not satisfied. *Kirschenbaum v. 650 Fifth Avenue*, 830 F.3d 107, 123 (2d Cir. 2016); see also *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014), *overruled by Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016); and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015), *overruled by Rubin v. Islamic Republic of Iran*, 830 F.3d 470. Moreover, subsection 1610(g) makes assets of designated state sponsors of terrorism available for execution regardless of whether they are blocked. *Bank Markazi*, 136 S. Ct. at 1318 n.2; *Harrison v. Republic of Sudan*, 838 F.3d 86, 96-97 (2d Cir. 2016). Finally, and as even the court below agreed, subsection 1610(g) enables judgment creditors of state sponsors of terrorism to pierce the corporate veil of state-owned, juridically separate agencies or instrumentalities. Pet.App. 35; see also *Bank Markazi*, 136 S. Ct. at 1318 n.2; *Bennett*, 825 F.3d at 958-959 (9th Cir. 2016).

In one of the first decisions to both construe and apply subsection 1610(g), then-Chief District Judge Lamberth held that based upon both its ***text*** and ***purpose***, subsection 1610(g) "subject[s] ***any*** property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Estate of Heiser*, 807 F. Supp. 2d at 21 (emphasis supplied). Addressing the statute's text, Judge Lamberth held, "[i]n crafting the broad remedial language of § 1610(g), Congress made no exceptions to its reach." *Id.* at 26. And, he wrote, "a core purpose" of the 2008 FSIA amendments was "to significantly expand the number of assets available for attachment in satisfaction of terrorism-related judgments. . . ." *Id.*

Likewise, in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 960 (9th Cir. 2016), the Ninth Circuit also relied expressly on the ***text*** and ***purpose*** of subsection 1610(g), and held that the statute enables execution upon ***any*** assets of a foreign state or its agencies or instrumentalities. The Ninth Circuit refused to construe subsection 1610(g) as applying only where property used by the foreign state for a commercial activity, as required under subsection 1610(a), or where the state instrumentality is engaged in commercial activity in the United States, as required under subsection 1610(b). Imposing such a requirement would "read into § 1610(g) a limitation that Congress did not insert." *Bennett*, 825 F.3d at 960.

However, in the case below, the Seventh Circuit panel explicitly disagreed with *Bennett*, overruled its own earlier decisions in *Gates* and *Wyatt*, and held that

subsection 1610(g) does no more than enable terrorism judgment creditors to enforce their judgments against the foreign states' instrumentalities that have been established as separate juridical entities. Pet.App. 34. The court further limited the applicability of subsection (g) by holding that it applies only where the judgment creditors can satisfy the strict requirements of subsections 1610(a) or (b). The Seventh Circuit's narrow construction cannot be squared with subsection 1610(g)'s statutory text or purpose. Accordingly, the decision below remains an aberration among the decisions addressing the statute's meaning and reach.

The starting point for any question of statutory construction is a review of the language of the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). However, where the language of the statute is ambiguous the Court examines the legislative background and basic purposes. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007). Subsection 1610(g) is ambiguous. Pet.App. 41; *Bennett*, 825 F.3d at 961. The Seventh Circuit's narrow construction cannot be reconciled with subsection 1610(g)'s language, the legislative background or basic purposes. The decision below should be overruled.

I. The text of subsection 1610(g) compels an expansive construction that is not limited by other provisions within § 1610.

A. The Seventh Circuit's construction renders subsection 1610(g) a self-contradictory, self-defeating provision that could almost never be applied.

The opening clause of subsection 1610(g)(1) provides:

> (1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

1. Subsection 1610(g) allows attachment of "the property" of the foreign state judgement debtor and "the property" of an agency or instrumentality[4] of such a state. The word property is not modified; subsection 1610(g) imposes no restrictions on the type of property that is subject to execution. Additionally subsection 1610(g) reaches property that is a separate juridical entity or an interest held directly or indirectly in a separate juridical entity. See *Peterson*, 627 F.3d at 1123 n.2; *Weinstein*, 831 F.3d at 483; *Gates*, 755 F.3d at 576; Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle against Terrorism*, 19 Duke J. Comp. & Int'l L. 307, 332-333 (2009), *quoted in Heiser*, 807 F. Supp. 2d at 19 n.8. By waiving United States sovereign immunity as to blocked or other regulated assets of the foreign state or its agencies, subsection 1610(g)(2) demonstrates that subsection (g)(1) allows execution upon both blocked and unblocked property.

Contrast subsection 1610(a), which allows execution only where the property is (i) used (ii) by the foreign state, itself, (iii) for a commercial activity (iv) in the United States, ***and*** one of the enumerated exceptions applies. (see subsection 1610(a)(1)-(7)). See e.g., *Kirschenbaum*, 830 F.3d at 123 and n.9. By its terms,

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[4] For purposes of this case, any distinction between an "agency" or an "instrumentality" is largely irrelevant. Unless critical to the analysis this brief will refer to both as an "agency."

subsection 1610(g) does not refer to these additional requirements. Additionally, subsection (a) provides no mechanism for execution upon blocked property, which is explicitly permitted by subsection 1610(g)(2).

The court below held that subsection 1610(g) enables judgment creditors to execute their judgments upon the property of the foreign state's agencies. But, based upon the "as provided in this section" clause of subsection 1610(g), "they must satisfy an exception to execution immunity found elsewhere in § 1610 – namely, subsections (a) or (b)." Pet. App. 35.

Applying this construction of subsection 1610(g) while attempting to satisfy the requirements of subsection 1610(a) creates internal contradictions. "By its own terms, § 1610(g) eschews" the restrictions based upon any "commercial" nature of the property, the use, if any, of the property, or the ***user*** of the property. *Ministry of Defense & Support for the Armed Forces v. Cubic Def. Sys.*, 984 F. Supp. 2d 1070, 1095 (S.D. Cal. 2013) ("Ministry of Defense"). This conclusion is not based only upon the fact that the word "property" in subsection 1610(g) is not modified by any use requirement. The real contradiction is based upon several of the so-called "*Bancec*" factors listed in subsection 1610(g)(1)(A)-(E). These factors cannot be reconciled with a requirement that the property being attached must be used by the foreign state judgment debtor for commercial activities. See *id.*

To illustrate, subsection 1610(g)(1)(C), provides that property of the foreign state may be executed

upon "regardless of" the degree to which officials of the foreign state manage property or otherwise control its daily affairs. This provision could almost never be reconciled with a requirement that the foreign state itself use the property for commercial activity. Similarly, subsection 1610(g)(1)(A) allows attachment regardless of the level of economic control the foreign state exerts over the property. And, subsection 1610(g)(1)(B) provides that property is subject to execution regardless of whether the profits generated by the property go to the government. Thus, by its terms, subsection 1610(g)(1) which enables execution upon foreign state-owned property ***"regardless of"*** significant use and financial factors, cannot at the same time, require satisfaction of the strict commercial or use requirements of subsection 1610(a).

2. Textually, reconciling subsection 1610(b) with subsection 1610(g) is even more problematic. Subsection 1610(b) provides that the property of a foreign state's ***agency*** is subject to execution ***only*** where the agency is engaged in commercial activity in the United States ***and*** where the agency has either waived its immunity or the judgment relates to a claim for which the agency is not immune under one of the jurisdictional immunity exceptions to immunity. 28 U.S.C. § 1610(b)(1)-(3). Subsection 1610(g) does not require that the agency be engaged in commercial activity within the United States. Additionally, subsection 1610(g) enables terrorism judgment creditors of the ***foreign state*** defendant to enforce the judgment against the state's ***agencies*** (by abrogating *Bancec*).

Thus, subsection 1610(g) permits execution against property of the ***agency*** even where the judgment is entered against the foreign state, alone, and not against the agency. The court below held that subsection 1610(g) enables execution only through satisfaction of the requirements of subsections (a) and (b). But superimposing the restrictions of subsection 1610(b) onto subsection 1610(g) would render subsection 1610(g) a nullity (assuming, as the court below held, that subsection 1610(g) does nothing but abrogate *Bancec*).

Consider the facts of *Bennett v. Islamic Republic of Iran*, S. Ct. Case No. 16-334. There, terrorism judgment creditors of Iran sought to enforce their judgment against money Visa allegedly owed to Bank Melli, an Iranian financial institution wholly owned by the Iranian government. Visa owed money to Bank Melli under a contract. But following the imposition of sanctions in 1996, Visa stopped payments to Bank Melli, and invested the money owed with a mutual fund. See Br. Iran in *Bennett v. Islamic Republic of Iran*, No. 13-15442, at 12-13 (9th Cir. filed October 9, 2013). Iran argued that the terrorism victims could not enforce their judgments against the money owed to Bank Melli because subsection 1610(g) enables execution only where the judgment creditors are able to satisfy subsection (a) or (b). *Id.* at 46.

Iran then argued that "[t]he only potentially relevant exception here is § 1610(b)(3), which provides that 'property in the United States of an agency or instrumentality of a foreign state ***engaged in commercial activity in the United States*** shall not be

immune from attachment' if 'the judgment relates to a ***claim for which the agency or instrumentality is not immune*** by virtue of section 1605A.'" *Id.* at 46-47 (emphasis in original). Iran asserted that "[t]here is no allegation that Bank Melli is 'not immune' from the underlying claim. . . ." *Id.* at 47. Thus, Iran argued that even if subsection 1610(g) abrogates *Bancec* for enforcement of § 1605A judgments, a plaintiff attempting to execute upon property of the state defendant's ***agency*** would still be required to demonstrate that the agency, in its own right, is liable for the underlying claim. See *id.* Thus, by reading all of the restrictions of subsection 1610(b) into subsection 1610(g), Iran would make it ***impossible*** to apply subsection 1610(g). But this is the construction that the Seventh Circuit adopted below.

Moreover, according to Iran's argument, subsection 1610(g) would make matters worse for judgment debtors. Under *Bancec*, a plaintiff must demonstrate justification to pierce the corporate veil of the foreign state's agency. But Iran's proposed construction of subsection 1610(g) would require the plaintiffs to prove that the agency itself is independently liable for the underlying § 1605A claim. If the plaintiffs could prove the agency's liability, they would not need to pierce the corporate veil to execute upon the agency's property under subsection 1610(g). They would have sued the agency in the first instance and enforced their judgment directly.

According to Iran's Ninth Circuit brief in *Bennett*, if the Seventh Circuit below is right and subsection (g)

requires the satisfaction of some other § 1610 execution immunity exception, subsection (b) cannot be an option. Under Iran's argument in *Bennett*, (and absent a waiver of immunity, see subsection 1610(b)(1)), it would be ***impossible*** to satisfy all of the restrictions of subsection 1610(b) and, at the same time, benefit from the veil piercing function of subsection 1610(g). If the ***agency*** is not immune under § 1605 or § 1605A, then a judgment creditor would not need to abrogate *Bancec*. And, if the agency or instrumentality is immune, according to the Seventh Circuit's construction of subsection 1610(g) abrogating *Bancec* will not help because subsection (b), by its terms, simply does not apply.

3. Notwithstanding these textual difficulties, the Seventh Circuit held that subsection 1610(g) operates only through subsections (a) or (b). The panel below based its holding on two principal arguments. ***First***, the court held that the words in subsection 1610(g)(1), "as provided in this section" would be "entirely superfluous" if subsection (g) does not refer to the other provisions of § 1610. Pet.App. 27.

Second, the court held that if subsection 1610(g) were a freestanding and almost limitless execution exception, subsections 1610(a)(7) and 1610(b)(3), which also relate to enforcement of terrorism judgments would likewise be superfluous. Pet.App. 27-28. Thus, both reasons for the court's rejection of the subsection 1610(g) construction favored by the vast majority of courts boil down to "the 'cardinal principal' that a statute should be interpreted to avoid superfluity." Pet.App. 27, *citing TRW, Inc. v. Andrews*, 534 U.S.

19, 31 (2001). But that does not withstand rationale scrutiny.

The Seventh Circuit held that subsection 1610(g)'s "as provided in this section" clause can ***only*** be understood to incorporate subsections 1610(a) and (b) into subsection 1610(g). Pet.App. 27, 35. Thus, the court held that subsection 1610(g) requires terrorism plaintiffs to satisfy one of those § 1610 provisions to enable execution. The Ninth Circuit explained that the phrase, "as provided in this section," refers to procedures contained in subsection 1610(f). *Bennett III*, 825 F.3d at 959. The Seventh Circuit rejected this interpretation as "highly strained." Pet.App. 33. However, the Seventh Circuit's decision fails to account for numerous textual elements that render its own construction not only strained, but unintelligible.

Assume that the Seventh Circuit correctly held that subsection 1610(g) merely "removes the *Bancec* barrier," which requires FSIA plaintiffs to overcome the presumption that government instrumentalities established as separate juridical entities are to be treated as legally distinct from the foreign sovereign. Pet.App. 4. Now, consider the opening clause of subsection 1610(g):

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid

> of execution, and execution, upon that judgment as provided in this section, regardless of – [the five *Bancec* factors].

This clause refers to three categories of property: (i) "property of a foreign state against which a judgment is entered under section 1605A;" (ii) "property of an agency or instrumentality of such a state;" and (iii) "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." Removing the *Bancec* barrier merely enables judgments against foreign states to be enforced against the states' juridically independent agencies and instrumentalities. Thus, it is reasonable that the statute would allow execution upon property that falls into category (iii).

But, the Seventh Circuit's construction cannot account for the statute's inclusion of categories (i) and (ii). The *Bancec* barrier could ***never*** interfere with execution upon "property of a foreign state" for purposes of enforcing a judgment entered against that very state. It is absurd to even discuss the separate entity rule in such a case. The same holds true for "property of an agency or instrumentality" that is not separate juridical entity. There is neither a need nor a possibility of removing a separate entity barrier when there is no separate entity. When judgment creditors seek to enforce their judgments against property of the state defendant, itself, or against property of agencies and instrumentalities that are not juridically separate, it is incongruous to even mention *Bancec*.

Moreover, as discussed above in reference to Iran's Ninth Circuit brief, ***if*** the Seventh Circuit is correct in holding that subsection 1610(g) is only operative where the requirements of another execution immunity exception has been satisfied, the only possible partner for subsection 1610(g) would be subsection 1610(a). According to Iran, subsection 1610(b) is eliminated because in the absence of a waiver of immunity by the agency, subsection 1610(b) applies only to enforcement of judgments that relate to claims for which ***the agency or instrumentality***, itself, is not immune under one of the jurisdictional immunity exceptions. See 28 U.S.C. § 1610(b)(1)-(3).

Furthermore, as the Seventh Circuit implicitly recognized, the other provisions of § 1610 would not pair with subsection 1610(g) to enable execution upon the property of a foreign state defendant's juridically separate agencies. Subsection (c) refers to certain notice requirements applicable under subsection (a) and (b), and does not enable any execution of judgments. Subsection (d) refers to prejudgment attachment and requires an explicit waiver by the defendant and other restrictions that would not facilitate enforcement of a terrorism judgment. Subsection (e) refers to the in rem arrest of a vessel pursuant to a first mortgage, again, a circumstance that is not relevant to enforcement of terrorism judgments. Finally, the Seventh Circuit held that subsection (f) is, for all intents and purposes, a dead letter, due to the presidential waiver of subsection (f)(1).

Thus, according to the Seventh Circuit's construction, "as provided in this section" refers to subsection 1610(a)(7), only. And, the "as provided in this section" clause of subsection 1610(g) should read, "as provided in ***sub***section (a)(7)." The *Rubin* panel objected to the Ninth Circuit's interpretation of "as provided in this section" because, the court wrote, "it implausibly reads the word "section" as "*sub*section," so the phrase "as provided in this section" actually means "as provided in *subsection (f)*." Pet.App. 33 (emphasis in original). But the Seventh Circuit's construction is even more problematic; according to the panel below, the phrase "as provided in this section" actually means "as provided in subsection (a)(7)."

B. A broad construction of subsection 1610(g) would not render other provisions superfluous.

The Seventh Circuit also objected to treating subsection 1610(g) as a comprehensive execution immunity exception because, it held, to do so would render subsections 1610(a)(7) and 1610(b)(3) superfluous. Pet.App. 27. Those subsections were enacted in 1996 with the original terrorism exception to jurisdictional immunity. They permit enforcement of terrorism judgments under the standard commercial use exceptions to execution immunity. Subsection 1610(g) applies only to terrorism judgments entered under § 1605A. It permits execution upon a wider range of assets than subsections 1610(a)(7) and (b)(3). Nonetheless, subsection

1610(g) does not render the conventional execution immunity exceptions superfluous.

When Congress enacted section 1083 of the NDAA of 2008, it created additional remedies for terrorism victims, including the expanded judgment execution possibilities available under subsection 1610(g). But, by its terms, subsection 1610(g) applies only to enforcement of judgments entered under the new terrorism exception to jurisdictional immunity, 28 U.S.C. § 1605A, and older judgments that have been converted to § 1605A judgments, as permitted by section 1083. Subsection 1610(g) does not apply to enforcement of older judgments – those that were entered under former § 1605(a)(7), the original terrorism exception and that were not converted to § 1605A judgments. See 28 U.S.C. § 1610(g)(1). Congress retained subsections (a)(7) and (b)(3) to enable enforcement of those older judgments. See *Gates*, 755 F.3d at 576 n.4; *accord Iran Terrorism Litig.*, 659 F. Supp. 2d at 40, *citing Simon v. Republic of Iraq*, 529 F.3d 1187, 1192 (D.C. Cir. 2008), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). These provisions are not superfluous.

Congress had an additional reason to retain the execution immunity exceptions of subsections (a)(7) and (b)(3). It needed these provisions to provide relief in other sets of cases that may not be covered by subsection 1610(g). One such example involved terrorism cases against Iraq, which had been a designated state sponsor of terrorism from 1990 until 2003, when the United States and its allies overthrew the Saddam

Hussein dictatorship. *Republic of Iraq v. Beaty*, 556 U.S. 848, 852 (2009). The United States focused its efforts on rebuilding Iraq as a stable ally. *Id.* Treating Iraq as an outlaw terror-sponsoring state was inconsistent with that goal. *Id.*

In 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act, 117 Stat. 559, 579 (2003) ("EWSSA"), which among other things, authorized the President to make inapplicable to Iraq any laws that applied to countries that supported terrorism. *Beaty*, 556 U.S. at 852-853. The President exercised that authority. However, in 2004, the D.C. Circuit held that the President lacked authority to waive § 1605(a)(7). *Acree v. Republic of Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004). Thus, some federal courts believed that victims of Iraq-sponsored terrorism were authorized to sue and maintain their actions against Iraq under former § 1605(a)(7). And, when Congress enacted § 1083, it included a provision purporting to ratify the *Acree* decision. See *Republic of Iraq v. Beaty*, 556 U.S. 848, 853 (2009). However, Iraq's susceptibility to suit under the original terrorism exception remained uncertain.

Section 1083 also authorized the President to waive the 2008 FSIA amendments as to Iraq. President Bush exercised that authority immediately upon signing the NDAA of 2008 into law. Based upon *Acree* and the § 1083 provision that sought to ratify *Acree*, it was reasonable to believe that Iraq was subject to suit under the former terrorism exception. And, because

the President waived § 1083 as to Iraq, it was reasonable to believe that subsection 1610(g) did not apply to Iraq. Thus, a 2008 CRS Report for Congress reviewed the FSIA terrorism provisions including § 1083 and concluded that while the President waived § 1083 as to Iraq, that waiver did not terminate cases proceeding under the former § 1605(a)(7). See Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* (2008) at 47 n.162. The report added that "arguably, the waiver of § 1083 has no impact on assets sought to be attached to satisfy judgments against Iraq under previous 28 U.S.C. § 1605(a)(7)." *Id.* Those assets would have been subject to execution only under § 1610(a)(7). *Id.*

In *Beaty*, 556 U.S. 848, the Court overruled the D.C. Circuit's holding in *Acree*, and held that claims could not proceed against Iraq under the former § 1605(a)(7). The Court held that President Bush's 2003 waiver of all antiterrorism laws as to Iraq terminated any claims under the terrorism exception, and that even claims against Iraq under the former § 1605(a)(7) were prohibited. But at the time § 1083 was enacted, the applicability to Iraq of the FSIA's terrorism exception was uncertain, and based upon *Acree*, Iraq appeared to remain subject to § 1605(a)(7). And, that mere uncertainty justified Congress's retaining the former execution immunity exceptions to provide some avenue for relief to judgment creditors of Iraq. Thus, even after the enactment of subsection 1610(g), subsections (a)(7) and (b)(3) are necessary to protect judgment creditors who, for whatever reason would not

be able to enforce their judgments under the new provision.

C. Subsection (g)'s reference to "this Section" does not require the satisfaction of the requirements of subsections (a) or (b).

1. The Seventh Circuit held that subsection 1610(g) "as provided in this section" clause necessarily requires the satisfaction of the requirements contained in subsections (a) or (b). As explained above, "as provided in this section" cannot possibly be so construed. The tension created by importing the contradictory terms of (a) and (b) into subsection (g), as well as the history of the legislation drove the Ninth Circuit to explicitly reject that construction, notwithstanding Iran's and the government's fierce objections. See *Bennett*, 825 F.3d at 960. *Bennett* held that the term "this section" refers to "procedures contained in subsection (f)." The Seventh Circuit called this construction "highly strained." Pet.App. 33. But if the alternative is the Seventh Circuit's construction, strained is preferable to self-contradictory and self-defeating.

But, the Ninth Circuit's construction is not so strained. Both subsections (g) and (f) were specifically tailored to facilitate enforcement of terrorism judgments. Both enable judgment creditors to execute upon blocked and regulated property, although subsection (g) reaches unblocked property as well. *Bank Markazi*, 136 S. Ct. 1318 n.2. Note that if even some of the property that can be reached under subsection 1610(g) is

blocked, that provision cannot work via subsections (a) or (b), neither of which, according to the Seventh Circuit, would allow execution upon blocked assets, because such assets cannot be "used" by the foreign state or its agencies.

After President Clinton waived the applicability of § (f)(1), it makes sense for a new exception to executional immunity to refer to procedures codified in section (f)(1) because those procedures were specifically written to apply to actions to enforce terrorism judgments. The Ninth Circuit's construction also satisfies the broad remedial purposes of § 1083, and is consistent with the history of the various terrorism exceptions to foreign jurisdictional and executional immunity

2. There is a third, alternative construction that resolves much of the tension created by both *Rubin* and *Bennett*. The words, "this section" in the "as provided in this section" clause do not refer to section 1610 at all. Rather, "this section" refers to the entirety of section 1083 of the NDAA of 2008. App. 36-51. Section 1083 in the NDAA, is titled, "Sec. 1083. Terrorism Exception to Immunity." Subsection 1083(a)(1) creates 28 U.S.C. § 1605A, and names it: "Terrorism exception to the ***jurisdictional*** immunity of a foreign state." App. 37 (emphasis supplied). The entire § 1083 applies to both jurisdictional and executional immunity exceptions for terrorism cases.

Section 1083(b)(3), enacted subsection 1610(g). See App. 44. An earlier version of the NDAA contained

a slightly different version of subsection 1610(g) that says the following in the opening lines of what became subsection 1610(g) (App. 57-58):

> (g) Property in Certain Actions. –
>
> (1) In General. – The property of a foreign state, or agency or instrumentality of a foreign state, against which a judgment is entered under ***this section***, including property that is a separate juridical entity, is subject to execution upon that judgment ***as provided in this section***, regardless of – [the *Bancec* factors]

See H.R. Rep. 1585 Engrossed Senate Amendment, 110th Cong. § 1087 (Oct. 1, 2007) (App. 52-60) (emphasis supplied). One of the differences between § 1087(c)(1) of the Engrossed Senate Amendment and the final version of the execution immunity provision in § 1083(b)(3), is that in the earlier version, quoted above, the term "this section" appears twice. In § 1083(b)(3), the first reference to "this section" is changed to read, "against which a judgment is entered under section 1605A." App. 44. But the second reference to "this section" is not changed. It is odd, to say the least, that the same phrase, "this section" appearing twice in the same sentence of a single statute would refer to two different "statutes." As ultimately codified in subsection 1610(g), if the Seventh and Ninth Circuits are right, the first reference to "this section" means § 1605A; and the second means subsection 1610(g). Granted, one could claim that the inconsistency was detected and corrected in § 1083(b)(3). But, the "corrected" version creates a statute that is

difficult to read no matter what meaning is attributed to the "as provided in this section" clause.

But what if the two references to "this section" contained in § 1087(c)(1) of the Engrossed Senate Amendment are consistent, and they both refer to § 1087 in its entirety? Then, the first "this section" was correctly changed to refer specifically to the subsection of the bill that became a section in its own right – § 1605A. But the second "this section" could refer specifically to § 1605A, or it could refer generally to the entire § 1087.

Note that each of the remaining provisions of section 1087 and later section 1083, which were not codified in the United States Code, but appear in the notes following § 1605A, all refer to "this section," and in each case, "this section" clearly refers to § 1083 or § 1087, as the case may be (and they are, for the most part, substantially similar). Consider § 1083. Subsection (c) provides for the retroactivity of the terrorism exceptions. It opens, "(1) In General. – The amendments made in ***this section*** shall apply to any claim arising under § 1605A. . . ." (emphasis supplied). Here, § 1083(c) cannot refer to its own codified section because it was never further codified. "This section" ***must*** refer to § 1083. The same is true for § 1083(d), which authorizes the President to waive any provision of "this section" as to Iraq, and § 1083(e), which provides for severability in the event a provision of "this section" is invalidated.

If the "as provided in this section" clause is understood to be consistent with the other references to "this

section" in the bill, it can be read sensibly. As discussed, above, § 1083 includes some unique provisions. For one, it allows damages that are not or might not be available under other provisions of the FSIA. These include punitive damages, claims for property loss, and various insurance-related claims. 28 U.S.C. § 1605A(c)(4), (d). Section 1606 specifically precludes punitive damages against a foreign state. If "as provided in this section" modifies the word "judgment" that precedes it, and refers to the entire § 1083, then subsection 1610(g) is telling us that judgment creditors may resort to its far-reaching execution provisions even beyond the amount of the compensatory damages, and that it overrides the prohibition on punitive damages contained in § 1606.

Additionally, § 1605A(g) provides for the imposition of a lien of *lis pendens* on all of the foreign state defendant's real and tangible personal property that is located in the judicial district so long as the property is subject to attachment and execution under § 1610. In the Engrossed Senate Amendment, that provision is not qualified by § 1610. The *lis pendens* applies without restriction. If § 1610 were always intended to be limited by the commercial use restrictions of subsection 1610(a) and (b), a pre-judgment lien provision would never have provided for an unlimited lien on all property. But, if subsection 1610(g) creates a freestanding execution immunity provision that reaches almost all of a foreign state's property, then an unlimited pre-judgment lien provision would be consistent with that final remedy. The amendment restricting the lien of *lis pendens* to property subject to § 1610 was intended to

take into account the prohibition against executing upon diplomatic, military, and certain central bank property that undeniably apply to subsection 1610(g).

Thus, reading "this section" as referring to § 1083, which includes ***both*** of the terrorism exceptions to sovereign immunity gives meaning to the "as provided in this section" clause, and is consistent with the other references to "this section" in § 1083. This construction is not self-contradictory, self-destructive, or "strained."

II. Any uncertainty as to the meaning of subsection 1610(g) should be resolved by giving effect to the clear legislative purpose behind § 1083 of the NDAA of 2008.

A. Deterring terrorism and providing relief to its victims outweigh considerations of grace and comity as to state sponsors of terrorism, which do not deserve such solicitude.

1. In *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), the Court observed that, prior to the enactment of the FSIA, the United States "***generally*** granted foreign sovereigns complete immunity from suit in courts of this country." (emphasis supplied). When the courts of one state rule on the legality of another state's governmental acts or judicially seize the other's property they risk seriously affronting the dignity of the foreign government. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 700, 703-704 (1994). Nevertheless, *Verlinden* teaches that

"foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." 461 U.S. at 486.

Verlinden provides context for the legislated "purpose" of the most recent terrorism-related amendment to the FSIA, the Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 853 (Sept. 28, 2016) ("JASTA"). In JASTA Congress explicitly articulates its intent:

> Purpose. – The purpose of this Act is ***to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States***, to seek relief against persons, entities, and ***foreign countries, wherever acting*** and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

Congress could not have been clearer in its statement that providing civil remedies for American victims of terror takes precedence over comity or any other justifications for foreign sovereign immunity.

Grace and comity may be the motivation behind foreign sovereign immunity. But, as JASTA demonstrates, they do not necessarily resolve all questions of immunity to the detriment of other important values. Both the State Department and the courts have denied foreign sovereign immunity to protect American national interests and to ensure that other nations recognize those interests. See e.g., *Alfred Dunhill*, 425 U.S.

at 700. And, both the State Department and the courts have denied foreign sovereign immunity to uphold the interests of an injured private party at the expense of comity. See e.g., *id.* at 705 n.18; see also *id.* at 706-711 (Appendix 1 Opinion of the Court, Letter of Monroe Leigh, Legal Advisor, Department of State, dated Nov. 26, 1975).

In *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), the court explained one rationale behind the restrictive view of foreign sovereign immunity:

> The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.

The court emphasized the interest of vindication of private rights as a counter-weight to the risk of offending the foreign sovereign. *Id.* The restrictive theory rejected the idea that comity, alone, should be determinative.

Perhaps the prime pre-FSIA example of the government placing the interests of injured private parties over the interests of comity is *Bernstein v. N.V. Nderlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), a case decided under

the act of state doctrine.[5] There, the Second Circuit amended its mandate to allow an action to proceed after the State Department issued a letter and press release establishing a new policy that placed the rights of victims of Nazi confiscations over the interests of international comity. The State Department letter, was issued years after the end of World War II, at a time when the United States enjoyed peaceful relations with Germany. It relieved "American courts from ***any restrain[t] upon the exercise of their jurisdiction*** to pass upon the validity of the acts of Nazi officials." (emphasis supplied). The shift in the State Department's position was not based upon the commercial or financial characteristic of the Nazi confiscations, but upon the "Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. . . ." *Id.* The withdrawal of restraint on the exercise of jurisdiction expressed in the State Department letter was absolute. It demonstrates that when the policy-making branches of government determine that comity should give way to other important values, their power to do so is unlimited.

2. Congress enacted the original terrorism exception to foreign sovereign immunity, 28 U.S.C.

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[5] Similar policy concerns relating to comity and international relations inform court decisions under the act of state doctrine and foreign sovereign immunity. See *Alfred Dunhill*, 425 U.S. at 708-709, Appendix I to Opinion of the Court.

§ 1605(a)(7), to provide American citizens with "an important economic and financial weapon" against designated state sponsors of terrorism, which Congress deemed, "outlaw states." *Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016), *quoting* H.R. Rep. No. 104-383, at 62 (1995). Unlike the original immunity exceptions, which were largely codifications of common law exceptions, the 1996 terrorism jurisdictional immunity exception was original.

The terrorism exception can be viewed either as an abrogation of foreign sovereign immunity or as an ***application*** of an expansive view of the restrictive theory of sovereign immunity. See Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?* The European Journal of International Law, Vol. 21, No. 4, 860-861 (2010) (observing that customary international law is increasingly tolerant of expansive applications of the restrictive theory of foreign sovereign immunity that include claims for massive human rights violations, torture, property destruction, mass killings of civilians during armed conflict, slave labor, and, of course, terrorism.). The *Bernstein* case discussed above and the State Department letter upon which it was based (discussed in the previous section) were examples of an expansive application of the restrictive view of foreign sovereign immunity. The expansive terrorism exception to foreign sovereign immunity could certainly find a precedent in *Bernstein*.

Alternatively, the terrorism exception could also be viewed as a justifiable departure from traditional

notions of foreign sovereign immunity. Congress has unmistakably decided that state sponsorship of terrorism represents "a certain category of sovereign act[]" that is so "repugnant to the United States and the international community" that it does not deserve immunity. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 2009).

Viewed in either light, holding state sponsors of terrorism to different standards than law-abiding states is a legitimate expression of Congressional authority, under both domestic and international law. "Congress has the power to withhold the privilege of jurisdictional immunity from foreign states that sponsor terrorist acts and to treat their property differently." *Ministry of Defense*, 984 F. Supp. 2d at 1095-1096.

3. Indeed, as a matter of policy, there is no reason why "grace and comity" should defeat claims of American victims of state-sponsored terrorism. "[T]errorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis* – an enemy of all mankind. . . ." *Flatow*, 999 F. Supp. at 23. The First Circuit has described terrorism as "the modern-day equivalent of the bubonic plague: it is an existential threat." *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013).

> [Terrorism] has become the insidious method by which certain rogue states operate to influence the international community, outside the

> normal bounds of international communication. No nation openly professes to support the use of terrorist methods, though several clandestinely do. Although there are traditional methods of effecting change on the world stage – including diplomacy, trade and economic sanctions, and even the use of organized armed conflict under established international rules of war – certain states instead choose to conduct their policy through naked violence directed at individuals. In such circumstances, "traditional notions of fair play and substantial justice" are stretched to the limits.

For more than three decades, Iran has been among the most active state sponsors of terrorism. In an argument that the district court for the Northern District of Illinois deemed "more than outrageous," Iran asserted that it was ***justified*** in its continuing support of terrorism and extrajudicial killing of Americans, in taking over the United States embassy in Tehran and holding 52 American diplomats and citizens hostage for more than one year, bombing the United States marine barracks in Beirut, Lebanon in 1983 killing 241 American servicemen, and in carrying out and supporting countless acts of terrorism. *Rubin v. Islamic Republic of Iran*, Case No. 03-Civ-9370 (N.D. Ill.) Dkt. No. 656-10 at 10-21 (August 22, 2008).

To borrow a phrase from the district judge, treating Iran with grace and comity is "more than outrageous." Through § 1083, Congress has clearly expressed it intent to distinguish Iran and the other

designated state sponsors of terrorism and to hold them civilly liable to their American victims. As Judge Hamilton wrote in his dissent from the denial of rehearing *en banc*:

> We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are undeserving beneficiaries of the unusual steps taken by the Rubin panel.

Pet.App. 42.

B. Section 1083 of the NDAA of 2008 manifests a clear legislative intent to enable terrorism victims to enforce their terrorism judgments to the fullest extent.

In § 1083, Congress introduced several far-reaching innovations in foreign sovereign immunity jurisprudence. These innovations include, among others, the creation of a private right of action targeting the actions of the foreign state, § 1605A(c); the imposition of punitive damages, § 1605A(d); the automatic imposition of a pre-judgment lien of *lis pendens* on practically all assets of the sovereign defendant or those of any entity controlled by the defendant, § 1605A(g); and the abrogation of res judicata, collateral estoppel, and limitations periods specifically designed to empower terrorism victims to compound their claims and damages awards, at the expense of the foreign state defendants. Any one of these innovations standing alone would be

considered a serious affront to the dignity of a sovereign defendant. Congress was not concerned about affronting Iran's dignity.

The numerous unique provisions of § 1083 clearly manifest Congress's intent to both compensate terrorism victims and to punish Iran. Construing subsection 1610(g) as a comprehensive execution provision reaching nearly all foreign state property is entirely consistent with the entirety of § 1083. As the D.C. Circuit held in *Weinstein*, 831 F.3d at 483 (D.C. Cir. 2016), "the terrorist activity exception is, simply put, different" from other FSIA execution immunity exceptions. The *Weinstein* court, therefore, construed subsection 1610(g) to "strip[] execution immunity from ***all*** property of a defendant sovereign." *Id.* (emphasis in original).

Section 1610(g) was specifically intended to remove the remaining obstacles to terrorism judgment enforcement. See *Bank Markazi*, 136 S. Ct. 1318 n.2. It followed several unsuccessful attempts to empower terrorism judgment creditors to enforce their judgments. The Ninth Circuit in *Bennett* found persuasive a House Conference Report stating that the new law would subject to execution "any property in which the foreign state has a beneficial ownership." *Bennett III*, 825 at 962, *quoting* H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.). And, it quoted one of the sponsors of a predecessor bill that became subsection 1610(g) as saying foreign state defendants are subject to attachment based upon "the satisfaction of a simple ownership test." See *id.*, *quoting* 154 Cong. Rec. S54-01 (Jan.

22, 2008) (statement of Sen. Lautenberg). Other courts agree. "[A] core purpose of [subsection 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heiser*, 807 F. Supp. 2d at 26; see also *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016).

This "core purpose" can only be satisfied if subsection 1610(g) is correctly understood and uniformly applied. As Judge Hamilton wrote in his dissent from the denial of *en banc* review, the Seventh Circuit's erroneous and narrow construction of subsection 1610(g) "has important practical consequences." App. 39. Most important, the *Rubin* panel's reading of subsection 1610(g) restricts rather than expands the availability of assets for post-judgment execution. App. 39. Thus, the Seventh Circuit would return plaintiffs to the "long, bitter, and often futile quest for justice" that plagued them before Congress enacted 1610(g). See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009).

C. The Seventh Circuit's construction of subsection 1610(g) as requiring satisfaction of strict commercial use requirements is not consistent with Congress's clear intent to expand the possibilities for enforcement of terrorism Judgments.

One of the most formidable impediments to satisfaction of judgments against foreign states, generally,

is the commercial use requirement of subsection 1610(a). See Statement of the Case, section A.2, supra. The difficulty in satisfying this provision lies more in the "use" element than in the "commercial" element. Proceeds of commercial transactions found in a foreign state bank account may be immune because the foreign state did not ***use*** the money; it received the money. See *CBC*, 309 F.3d 240, 256 n.5. Under the decisions interpreting subsection 1610(a), seemingly, almost any passive account would not satisfy the "use" element. See Statement of the Case, Section A.2, supra. Of course, once a foreign state ***uses*** its money, the money is no longer available for the state's judgment creditors.

Superimposing the commercial use elements of subsection 1610(a) on enforcement of terrorism judgments under subsection 1610(g) would dramatically limit the intended benefits of the statute. In the instant case, the courts below held that the Iranian Artifacts were immune only because Iran, itself, did not use them. The Artifacts bear no characteristics of prototypically sovereign property. Private parties are as likely as sovereign states to own and use artifacts.

Similarly, in *Bennett*, the judgment creditors seek to execute their judgment against funds owed to Bank Melli, an agency of Iran. Those funds appear to be under the control of the interpleader plaintiffs. Requiring the *Bennett* parties to satisfy subsection (a) to enforce their judgment under subsection (g) would serve no purpose other than to defeat their efforts. Bear in mind, these funds are blocked, so Iran cannot

"use" them. And any affront to the dignity of Iran, to the extent it should matter, already occurred when the government blocked the assets. The same is true for the bank accounts that were at issue in *Gates*, 755 F.3d 568. And, in *Ministry of Defense*, 984 F. Supp. 2d 1070, the court applied the broad construction of subsection 1610(g), to allow the plaintiffs to seize a judgment that the Iranian Ministry of Defense had won against a defense contractor. That decision was affirmed on other grounds. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym*, 814 F.3d 1053 (9th Cir. 2016).

Without the benefits of the broad construction of subsection 1610(g), *Bennett*, *Gates*, and *Ministry of Defense* would all likely have turned out like *Rubin*, below. That result defies the core purpose of subsection 1610(g), which, as this Court recognized in *Bank Markazi*, 136 S. Ct. 1317-1318 (2016), was to free terrorism judgment creditors from the "practical and legal difficulties" that obstructed their enforcement efforts. The most prominent of these difficulties, and the one that, in 1998, first motivated Congress to legislate a solution was the commercial use requirement. See *id.*

The Seventh Circuit's construction of subsection 1610(g) would ensure that terrorism plaintiffs enforce their judgments only against property used for commercial activity by the foreign state itself, "as provided in" ***subsection*** 1610(a)(7). This construction defeats the purpose of subsection 1610(g) and § 1083 of the

NDAA of 2008, and would set back by twenty years terrorism judgment creditors' prospects of enforcing their judgments.

CONCLUSION

The Court should overrule the Seventh Circuit's holding as to subsection 1610(g) with instructions to enter judgment in favor of the petitioners.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

1. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of

law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) [Repealed]

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.

(1) In general. If –

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.

(A) Nazi-era claims. Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and –

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works. In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and –

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court

to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions. For purposes of this subsection –

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means –

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.

(1) No immunity. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard. The court shall hear a claim under this section if –

(A) (i) (I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 [note to this section] or is filed under this section by reason of section 1083(c)(3) of that Act [note to this section], the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section [enacted Jan. 28, 2008]) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of

an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations. An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of –

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action. A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages. After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.

(1) In general. The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds. The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal. In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.

(1) In general. In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice. A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability. Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions. For purposes of this section –

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1605B. Responsibility of foreign states for international terrorism against the United States

(a) Definition. In this section, the term "international terrorism" –

(1) has the meaning given the term in section 2331 of title 18, United States Code; and

(2) does not include any act of war (as defined in that section).

(b) Responsibility of foreign states. A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by –

(1) an act of international terrorism in the United States; and

(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

(c) Claims by nationals of the United States. Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

(d) Rule of construction. A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable

international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been

taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property

is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)

(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state

is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.

(1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. Any property of a foreign state, or agency or instrumentality of a foreign

state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders. Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Public Law 110-181
110th Congress

An Act

To provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TREATMENT OF EXPLANATORY STATEMENT.

(a) SHORT TITLE. – This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2008".

(b) EXPLANATORY STATEMENT. – The Joint Explanatory Statement submitted by the Committee of Conference for the conference report to accompany H.R. 1585 of the 110th Congress (Report 110-477) shall be deemed to be part of the legislative history of this Act and shall have the same effect with respect to the implementation of this Act as it would have had with

respect to the implementation of H.R. 1585, if such bill had been enacted.

* * *

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY. –

(1) IN GENERAL. – Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL. –

"(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD. – The court shall hear a claim under this section if-

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the

time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is reified under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting

within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS. – An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104208) not later than the latter of –

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS. –

"(1) IN GENERAL. – The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL. – In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION. –

"(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled

by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS. – For purposes of this section –

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS. – The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS. –

(1) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –

(A) in subsection (a) –

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS. – Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY. – Section 1610 of title 28, United States Code, is amended –

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS. –

"(1) IN GENERAL. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to

attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of-

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS. – Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT. – Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES. –

(1) IN GENERAL. – The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS. –

(A) IN GENERAL. – With respect to any action that –

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED. – The defenses of res judicata, collateral estoppel, and limitation period are waived –

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS. – A motion may be made or an action may be refiled under subparagraph (A) only –

(i) if the original action was commenced not later than the latter of –

(I) 10 years after April 24,1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS. – If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after –

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS. – Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11,117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ. –

(1) APPLICABILITY. – The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that –

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE. – The authority under paragraph (1) shall apply –

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS. – A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS. – It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY. – If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to

other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

In the Senate of the United States,

October 1, 2007.

Resolved, That the bill from the House of Representatives (H.R. 1585) entitled "An Act to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.", do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2008".

* * *

SEC. 1087. JUSTICE FOR MARINES AND OTHER VICTIMS OF STATE-SPONSORED TERRORISM ACT.

(a) SHORT TITLE. – This section may be cited as the "Justice for Marines and Other Victims of State-Sponsored Terrorism Act".

(b) TERRORISM EXCEPTION TO IMMUNITY. –

(1) IN GENERAL. – Chapter 97 of title 28, United States Code, is amended by inserting of section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL. –

"(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD. – The court shall hear a claim under this section if –

"(A) the foreign state was designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405 (j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later designated as a result of such act;

"(B) the claimant or the victim was –

"(i) a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(ii) a member of the Armed Forces of the United States (as that term is defined in section 976 of title 10); or

"(iii) otherwise an employee of the government of the United States or one of its contractors acting within the scope of their employment when the act upon which the claim is based occurred; or

"(C) where the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.

"(b) DEFINITION. – For purposes of this section –

"(1) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note);

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

"(3) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

"(c) TIME LIMIT. – An action may be brought under this section if the action is commenced not later than the latter of –

"(1) 10 years after April 24, 1996; or

"(2) 10 years from the date on which the cause of action arose.

"(d) PRIVATE RIGHT OF ACTION. – A private cause of action may be brought against a foreign state designated under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405(j)), and any official, employee, or agent of said foreign state while acting within the scope of his or her office, employment, or agency which shall be liable to a national of the United States (as that term is defined in section 101(a) (22) of the Immigration and Nationality Act (8 U.S.C. 1101(a) (22)), a member of the Armed Forces of the United States (as that term is defined in section 976 of title 10), or an employee of the government of the United States or one of its contractors acting within the scope of their employment or the legal representative of such a person for personal injury or death caused by acts of that foreign state or its official, employee, or agent for which the courts of the United States may maintain jurisdiction under this section for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in this section. A foreign state shall be vicariously liable for the actions of its officials, employees, or agents.

"(e) ADDITIONAL DAMAGES. – After an action has been brought under subsection (d), actions may also be

brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and life and property insurance policy loss claims.

"(f) SPECIAL MASTERS. –

"(1) IN GENERAL. – The Courts of the United States may from time to time appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under sections 1404C of the Victims Crime Act of 1984 (42 U.S.C. 10603c) to the Administrator of the United States District Court in which any case is pending which has been brought pursuant to section 1605(a)(7) such funds as may be required to carry out the Orders of that United States District Court appointing Special Masters in any case under this section. Any amount paid in compensation to any such Special Master shall constitute an item of court costs.

"(g) APPEAL. In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(h) PROPERTY DISPOSITION. –

"(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of

lis pendens upon any real property or tangible personal property located within that judicial district that is titled in the name of any defendant, or titled in the name of any entity controlled by any such defendant if such notice contains a statement listing those controlled entities.

"(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.".

(2) AMENDMENT TO CHAPTER ANALYSIS. – The chapter analysis for chapter 97 of title 28, United States Code, is amended by inserting after the item for section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(c) CONFORMING AMENDMENTS. –

(1) PROPERTY. – Section 1610 of title 28, United States Code, is amended by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS. –

"(1) IN GENERAL. – The property of a foreign state, or agency or instrumentality of a foreign state, against which a judgment is entered under this section, including property that is a separate

juridical entity, is subject to execution upon that judgment as provided in this section, regardless of –

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from execution upon a judgment entered under this section because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.".

(2) VICTIMS OF CRIME ACT. – Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988, with respect to which an investigation or" and inserting "October 23, 1983, with

respect to which an investigation or civil or criminal".

(3) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –

(A) in subsection (a) –

(i) in paragraph (5) (B), by inserting "or" after the semicolon;

(ii) in paragraph (6) (D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7); and

(B) by striking subsections (e) and (f).

(d) APPLICATION TO PENDING CASES. –

(1) IN GENERAL. – The amendments made by this section shall apply to any claim arising under section 1605A or 1605(g) of title 28, United States Code, as added by this section.

(2) PRIOR ACTIONS. – Any judgment or action brought under section 1605(a)(7) of title 28, United States Code, or section 101(c) of Public Law 104-208 after the effective date of such provisions relying on either of these provisions as creating a cause of action, which has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action opposable against the state, and which is still before the courts in any form, including appeal or motion under Federal Rule of Civil Procedure 60(b), shall, on motion made to the Federal District Court where the judgment or action was initially entered, be given effect as if it had originally been filed pursuant to section

1605A(d) of title 28, United States Code. The defenses of res judicata, collateral estoppel and limitation period are waived in any re-filed action described in this paragraph and based on the such claim. Any such motion or re-filing must be made not later than 60 days after enactment of this Act.